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IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

No. 680

REBECCA SELKOE WOLFSOHN, Executrix for the Estate of JOEL DAVID WOLFSOHN, Deceased, *Petitioner*,

v.

GREGORY HANKIN and PROFESSIONAL INVESTMENT MANAGEMENT COMPANY, *Respondents*.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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STATEMENT IN OPPOSITION

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RESPONDENT HANKIN'S STATEMENT IN OPPOSITION

THE FACTS

On December 26, 1961, Petitioner brought action (JA 3-6)* against Professional Investment Management Company (PIMCO) for breach of contract of employment between it and Petitioner's decedent, Joel D. Wolfsohn, as Secretary of the Corporation. Joined as defendants were Consumers Investment Fund, Inc.

* (JA ....) denotes the page references to the Appendix filed by Petitioner in the Court below. (SA ....) denotes page references to the Supplemental Appendix filed by the Respondent in the Court below.

(CIF) and Gregory Hankin (President of Pimco and Executive Vice-President of CIF), although neither of them was a party to the contract alleged to have been breached.[1]

The gravamen of the complaint was that under PIMCO by-laws only Board members could be officers of the Corporation; that Hankin "withheld" decedent's reelection as a member of the Board, thus rendering his contract a "nullity and impossible to perform"; and that Hankin unfairly accused the decedent of failing to perform his duties as Secretary, thus creating an intolerable situation, which forced the decedent to submit his resignation (JA 4).

Respondent Hankin, as General Counsel of the two corporations, defended the action brought against them.[2] He also filed an answer on his own behalf

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[1] After the District Court granted summary judgment in favor of all three defendants, Petitioner entered into an arrangement with one Douglas F. Thornsjo who succeeded Mr. Hankin as chief executive officer of the two corporations, whereby the action against CIF was to be dropped and the action against the remaining defendants continued with the understanding that, if a judgment is recovered against PIMCO, the latter would bring action against Hankin and his former associates (JA 49, SA 112-4, 131-4). From that point on, PIMCO was carried as a party defendant *pro forma*. In the Court of Appeals, PIMCO entered no appearance and filed no brief. The real and only Respondent herein is Gregory Hankin.

[2] Soon afterwards, Hankin resigned his offices in PIMCO and CIF. In anticipation of his resignation, Mr. Thornsjo requested him to continue defending the corporations (SA 130). Upon learning of the arrangement entered into, Respondent filed a motion for leave to withdraw as attorney for the corporations (SA 135-8). The motion was granted, "good cause for said motion having been shown" (SA 153). Respondent continued to act as attorney *pro se* until his departure for Europe, when his present attorney, Mr. John V. Long, entered his appearance and argued the case.

which included a motion to dismiss and for summary judgment (JA 13-4). He challenged the complaint for breach of contract as frivolous, since there was no contract between him and Petitioner's decedent for the breach of which an action could be maintained. His further defense was that the complaint was, if anything, an action in tort alleging that he had wrongfully induced PIMCO to breach its contract with the decedent, but that such a right of action did not survive the decedent.[3]

In paragraph 3 of his answer, Hankin adopted all of the defenses in PIMCO's answer; namely, (1) that the complaint was defective in that it failed to state that the decedent was ready, willing and able to perform his part of the agreement (SA 53-4), (2) that there was no such provision in PIMCO's by-laws as alleged in the complaint (SA 54-5, 67-8), (3) that under PIMCO by-laws, Respondent *could not* withhold decedent's reelection to the Board (SA 61, 68), (4) that Respondent *did not* withhold decedent's reelection, since he was *unanimously* renominated for a full five year term (SA 62, 72), (5) that the decedent resigned voluntarily (SA 62, 73) and (6) that the claim asserted in the complaint was a partnership claim of the firm of Chapman, Wolfsohn and Friedman, which had been settled by the surviving partners (JA 19, SA 65-6).

Petitioner opposed Respondent's motion for summary judgment (JA 22-3), but did not deny or put into issue any of the facts stated in the answer. Instead,

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[3] In the District Court, Petitioner rejected this view, insisting that "*the complaint is a suit upon a contract*" (JA 26). In the petition herein Petitioner states that "Respondents had wrongfully terminated • • • the contract" (Pet. p. 4).

she filed her own motion for judgment on the pleadings and for summary judgment (JA 24-31).

On May 7, 1962, the District Court entered an Order granting Respondent's motion for summary judgment and denying Petitioner's motion (SA 78).

On May 11, 1962, the District Court on Petitioner's motion granted a thirty day extension of time within which to file a motion to vacate and reconsider the Order of May 7, 1962. On June 11, 1962, Petitioner filed such a motion, claiming "newly discovered evidence." This motion was denied on October 12, 1962 (JA 52). On November 3, 1962, Petitioner filed a Notice of Appeal from the Order of October 12, 1962, that is, from the Order denying reconsideration (JA 52). No appeal has ever been taken from the Order of May 7, 1962.

On May 29, 1963, the Court of Appeals rendered its decision (321 F. 2d 393). Treating the appeal as having been taken from the Order of May 7, 1962, it held:

> "The notice of appeal being untimely filed, this court lacks jurisdiction and the appeal must be dismissed."

However, treating the appeal as having been taken from the Order of Oct. 12, 1962, the Court *affirmed* the disposition of the case by the District Court, and in this connection held:

> "The motion under Rule 60(b) addresses itself to the discretion of that court, and, after studying the record as made, including the alleged newly discovered evidence, we find no abuse."

Petitioner filed a motion for rehearing by the Panel of the three judges who rendered the decision and by

the Court *en banc*. The Panel denied the motion on August 1, 1963, and the Court *en banc* denied it on September 18, 1963.

ARGUMENT

Respondent submits that the Court of Appeals reached the correct result on both grounds, although it was not necessary to consider the Notice of Appeal as an appeal from the Order of May 7, 1962. So emphatic was Petitioner's determination to appeal from the Order of October 12, 1962, and not from the Order of May 7, 1962, that her counsel excluded this Order from his so-called "Joint Appendix." It was included in the Supplemental Appendix (SA 78) by Respondent over Petitioner's objection that anything beyond the matters designated by her was irrelevant to the appeal. This distinguishes the case at bar from *Thompson* v. *Immigration Service,* U.S. , decided January 6, 1964, where an appeal was taken from the original order, as distinguished from an order denying rehearing. Petitioner's statement (Pet. p. 6, para. 2) that the appeal was taken from the Order of May 7, 1962, must be deemed an inadvertent error, since Item 8 on page 5 of the Petition correctly states that the appeal was from the Order of October 12, 1962.

I. Treated As An Appeal From the Order of May 7, 1962, the Notice of Appeal Was Untimely Filed and the Court Lacked Jurisdiction

Rule 73(a) of F.R.C.P. prescribes *how* and *when* an appeal may be taken, namely, by *filing a notice of appeal* within *30 days* from the "entry of the judgment appealed from". It then provides:

> "The running of the time for appeal is terminated by a *timely* motion made pursuant to any of the rules hereinafter enumerated, and the full time for appeal fixed * * * commences to run and is to be computed from the entry of any of the following orders made upon a *timely* motion under such rules: [among them] * * * denying a motion for a new trial under Rule 59." (emphasis supplied)

Rule 59(b) F.R.C.P. requires that a motion for a new trial (which includes a motion for reconsideration or rehearing) "shall be served not later than 10 days after the entry of the judgment."

The motion for reconsideration in this case was not filed by May 17, 1962, within the time prescribed by Rule 59, hence the running of the time for appeal was not extended under Rule 73(a). The Notice of Appeal filed on Nov. 3, 1962 was thus too late to bring the appeal within the jurisdiction of the Court of Appeals.

Petitioner makes it appear that this application of the Rule would work a hardship, because at the time when the Order of May 7, 1962 was entered, her attorney was at the hospital "recovering from an illness involving major surgery" (Pet. pp. 4, 6, 7, 9, 10). No question of hardship is involved. Despite the 30 day extension for filing a motion to reconsider the Order of May 7, 1962, Petitioner could still have filed a Notice of Appeal from this Order on or before June 6, 1962. Since her attorney was not disabled from filing a motion for extention of time on May 11, 1962, nor from filing a 13-page motion for reconsideration on June 11, 1962, it is reasonable to conclude that he was not disabled from filing a 1-page form of Notice of Appeal by June 6, 1962. Had she filed a Notice of

Appeal on or before June 6, 1962, and followed it up by the Notice of Appeal from the Order of Oct. 12, 1962, denying reconsideration, she would have come within the decision of this Court in *Foman* v. *Davis*, 371 U.S. 178.

Petitioner argues that the time for appeal should be deemed extended because she had been "lulled into a false sense of security" by the order of the District Court granting an extension of time (Pet. p. 8). Unless the time is extended, Petitioner claims, lawyers will be unable to rely on the decisions of the District Court judges, and "the administration of justice will be seriously handicapped" (Pet. pp. 8, 9, 10). This magnifies the consequences beyond all reason.

Petitioner erroneously treats of the extension of time for filing a motion for reconsideration as if that involved a representation on which she relied to her damage. The District Court did not invite either the motion to extend the time or the motion for reconsideration. There certainly was no implied promise or representation by the District Court that, when it granted the privilege of filing a motion for reconsideration out of time, there would also be granted an extension of time for the filing of Notice of Appeal. Furthermore, Petitioner could not have relied on any action of the District Court, since she never appealed from the Order of May 7, 1962. In this respect, also, the case at bar differs from *Thompson* v. *Immigration Service, supra.*

Nor can it be said that a motion for reconsideration is a pre-requisite for appeal and that an extention of time for filing a motion for reconsideration is an empty gesture, unless the time for appeal is also extended. A motion for reconsideration serves a

purpose sufficient unto itself. Had Petitioner in this motion shown that she did have a good cause of action and that the "newly discovered evidence" raised a genuine issue of fact, the District Court might have reconsidered[4] and vacated the Order granting summary judgment before any notice of appeal was filed. Had the District Court failed to do so, the Court of Appeals would have ruled, upon review of the Order of October 12, 1962, that there was abuse of discretion. But such was not the case. Petitioner's disappointment stems, not from any failure to extend the time for appeal, but from the deficiency in her own case. There was never any basis for her action, either in law or in fact. Her assertion that the Court of Appeals abused its discretion (Pet. p. 7) is wholly without merit, as is also her extravagant claim (loc. cit.) that she was denied "due process of law."

Petitioner seems to argue that her right of appeal stems from Respondent's failure to object to her motion for extension of time (Pet. pp. 5, 6). Respondent must confess that, throughout the proceedings below, he was loathe to press any technical rules against Petitioner. Respondent's aversion to taking advantage of Petitioner's failure to comply with the Rules was carried even to the proceedings in the Court of Appeals despite all that had transpired. In the course of the oral argument, Respondent's attorney stated that he preferred to have the case considered on

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[4] Obviously, the statement of the Court below that the motion for rehearing came too late to be "considered" was *obiter dictum*, not necessary for the decision. The *ratio decidendi* was that the motion came too late "to interrupt the running of the time for appeal." In a larger sense, the entire treatment of the appeal as being from the Order of May 7, 1962, was *obiter*, since the only appeal taken was from the Order of October 12, 1962.

the merits. Respondent's indulgence, however, did not confer jurisdiction on the Court of Appeals to review the Order of May 7, 1962, from which no appeal had been taken.

II. There Was No Abuse of Discretion in Denying Rehearing

The Court below then treated the Notice of Appeal as being what it was on its face; namely, an appeal from the Order of October 12, 1962, denying reconsideration. Thus, the Court of Appeals did exercise jurisdiction and it affirmed the Order of the District Court.

It is not customary, and it is not necessary, for the District Court to write an opinion denying a motion for reconsideration. It is sufficient if there exists a reasonable ground for the denied. In this case, the reasons supporting the disposition of the District Court are many. In the Court below, Respondent pointed out ten good grounds for the denial of Petitioner's motion. It is sufficient here to point out two of them.

(1) The motion for reconsideration was said to be based on "newly discovered evidence" (JA 32-34); namely, the minutes of PIMCO's Executive Committee meeting of Feb. 11, 1959 (JA 37). But this "alleged newly discovered evidence" (as the Court below characterized it) was not evidence of decedent's involuntary resignation or of a continuing demand for $10,000, as represented by Petitioner. The minutes made no mention of any money demand (SA 101). If anything, it was evidence corroborative of PIMCO's defense that Mr. Wolfsohn had resigned voluntarily (SA 62, 73).

(2) Assuming that all of Petitioner's allegations were true, they were definitely irrelevant and immaterial. They did not create a contract for the breach of which an action could be maintained against Respondent; they did not create a right of action in tort which would survive the decedent, notwithstanding the provision of Title 12, Sec. 101, D.C. Code, 1961; and they did not create any genuine issue of fact as to any of the defenses in PIMCO's answer adopted by Respondent.

It cannot be said, therefore that the District Court abused its discretion in denying the motion for reconsideration. Petitioner's suggestion (Pet. p. 10), that the ruling of the Court below in this respect should be disregarded, merits no reply.

For the above reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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GREGORY HANKIN
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